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No. 85-1457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CATERPILLAR TRACTOR CO.,

Petitioner,

v.

WILLIAM WHEELER AND JUDITH WHEELER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Illinois

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED

Whether the state common law tort remedy of retaliatory discharge created by the Illinois Supreme Court is pre-empted by the Energy Reorganization Act, 42 U.S.C. Section 5851 (1982).

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS[1]

Respondents, William Wheeler and Judith Wheeler, respectfully pray that a Writ of Certiorari not issue to review a decision and order of the Illinois Supreme Court.

REASONS FOR DENYING THE WRIT

The Petitioner is requesting this court to conclude that Section 210 of the Energy Reorganization Act,

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[1] Ms. Wendy Welch, senior law student, Southern Illinois University, College of Law, assisted counsel in preparation of this brief, and who gratefully acknowledge her efforts.

42 U.S.C. Section 5851 (1982), pre-empts the Illinois common law tort of retaliatory discharge under the circumstances alleged by the respondent in his complaint originally filed in state court. In arguing that Congress has completely pre-empted all issues related to nuclear safety, the petitioner asserts that the Illinois Supreme Court in its decision below ignored the "broad pre-emptive sweep" of *Pacific Gas and Electric Company vs. State Energy Comm.*, 461 U.S. 190 (1983), and urges this Court to abandon the surgical analysis it employed in that decision as well as its decision in *Silkwood v. Kerr-McGhee Corp.*, 464 U.S. 238 (1984) in favor of an all encompassing pre-emptive fiat. In making this assertion, the petitioner concludes that only economic questions of energy generation have been ceded to the states. This conclusion cannot be reconciled with this court's analysis in *Silkwood, supra.*

I. THE ILLINOIS SUPREME COURT'S DECISION IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Energy Reorganization Act, was enacted by Congress to replace the Atomic Energy Act of 1954, transferring the regulatory scheme of that Act to various departments of the federal government and establishing the Nuclear Regulatory Commission (NRC) with enabling authority to promulgate regulations regarding the radiological aspects of nuclear reactor construction and operation. The overall purpose being to promote the civilian use of nuclear power and thereby remove the generation of nuclear energy from the federal government as a complete monopoly. Thus, while the federal government would continue to regulate radiological safety insofar as the

construction and operation of nuclear power plants are concerned, the states retained traditional responsibility of regulating utilities in determining questions of need, reliability, cost and other related state concerns. *Pacific Gas and Electric Co., v. State Energy Comm.*, 461 U.S. 190 (1983).

This Court did not paint with so broad a brush in *Pacific Gas* as to prevent California from enacting legislation imposing a moratorium on additional nuclear reactor construction within its boundaries until the state commission had made a determination that appropriate technology existed for the safe disposal of high level radiological waste material generated by these plants. This was in the area of traditional state responsibility regarding the need and reliability of certain aspects of nuclear energy generation found by this Court to have been retained by the states. In so doing, this Court reiterated its long held position that absent explicit pre-emptive language, Congress' intent to supercede state law may be found from a scheme of regulation so pervasive as to make reasonable the inference that there is no room to supplant it, or if not entirely displaced, pre-empted to the extent that state law conflicts with, creates a physical impossibility, or serves as a complete obstacle to the accomplishment of congressional purposes. *Id.* 461 U.S. at 204.

The Illinois Supreme Court in its decision below, found that Section 210 did not conflict with state tort law in that the action for retaliatory discharge, as applied to the facts of the respondent's complaint created a broader remedy than made available by that statute. It was not limited simply to "a whistle blower" within the meaning of that statute and fur-

ther, that it provided for additional punitive damages. Disagreeing with the Illinois Fourth District Appellate Court, the Illinois Supreme Court concluded that the respondent need not have made external complaint to the NRC prior to his discharge in order to state a cause of action for retaliatory discharge. Further, in enunciating the policy of the State of Illinois in this area, the Illinois Supreme Court reaffirmed punitive measures enforceable against the petitioner in the form of exemplary damages.

The all pervasive remedy argued by the petitioner as being available through Section 210 limits that remedy both in terms of class of persons protected as well as permissible result. In order to proceed under Section 210, an employee must assert that he commenced or caused to be commenced a proceeding under the Atomic Energy Act of 1954 as amended, testified or was about to testify in such a proceeding, or assisted in the participation in any manner in such a proceeding. This provision presupposes a proceeding in some form having already commenced or having been initiated by the employee. *Mackowiak v. Universal Nuclear Systems*, 735 F2d 1159 (9th cir. 1984). Additionally, the ascertainable result is limited to reinstatement, and compensation as well as attorney's fees and costs. There is no provision for punitive damages. This enforcement provision would not apply to the respondent in that there were no proceedings initiated prior to his termination, a fact relied upon by the petitioner in the courts below in its assertion that the respondent could not state a cause of action under Illinois state law.

The "broad pre-emptive sweep" relied upon by the petitioner also cannot be reconciled with this Court's

analysis in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). If the "*pre-emptive sweep*" of federal regulation of nuclear safety is as broad as professed by the petitioner, this Court could not have decided *Silkwood* in the manner that it did. Concluding from its analysis of the legislative history of the Price-Anderson Act, this Court stated:

> More importantly, the only congressional discussion concerning the relationship between the Atomic Energy Act and state court remedies indicates that Congress assumed such remedies would be available. *Id.* 464 U.S. at 251.

The authority granted to the NRC through the Energy Reorganization Act to set safety standards did not foreclose state tort remedies. Congress assumed the traditional principles of state tort law would apply.[2]

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[2] The indemnity scheme provided in the Price-Anderson Act as protection to the nuclear industry from state tort lawsuits, enacted in point of time prior to Section 210, not only assumes that persons injured would pursue state tort remedies, but that the notion of "injury" as a part of the state tort law, would be as broad as permitted by that states highest court of last resort. The Illinois Supreme Court's decision below permits those in the position of the respondent to assert a cause of action for an "injury" broader than that contemplated by Section 210. The legislative history for Section 210 provides, "this section does not apply to an employee who acts outside the direction of his employer." 6 U.S.C.C.A.N. 7303 (1978). There is no further reference anywhere in a legislative history that this remedy is exclusive under all circumstances and thereby completely preempting any state action.

II. THE ILLINOIS SUPREME COURT'S DECISION BELOW DOES NOT CREATE A CONFLICT REQUIRING RESOLUTION BY THIS COURT.

The petitioner argues that the Illinois Supreme Court has impermissibly intruded in an area this Court has already decided is federally pre-empted, and in so doing, has replaced congressionally established remedies contrary to an explicit congressional mandate. It argues that this creates a dangerous precedent for further excursions by state courts into other areas of nuclear safety regulations. In partial support for this position the petitioner cites six other federal regulatory schemes in which it claims there are similar employee protection provisions as that provided by Section 210. Two of these schemes employ language virtually identical to that of Section 210; [3] three others use language substantially similar[4] and one provides a general statement of policy only.[5] The best of these provisions, like Section 210, limits the scope of the remedy to those employees who make outside complaint or otherwise participate in a proceeding under those various acts and are limited to ordinary damages, reinstatement, attorneys fees and costs. To the extent that an employee is in the position of the respondent and not covered by these provisions, no conflict is presented in the enforcement of the federal

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[3] Toxic Substances Control Act, 15 U.S.C. Section 2622; Clean Air Act, as amended, 42 U.S.C. Section 7622.

[4] Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1293; Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1367; Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. Section 6971.

[5] Asbestos School Hazard Detection and Control Act, 20 U.S.C. Section 3608.

regulatory scheme since it does not apply. This is an area chosen by Congress *not* to be regulated or preempted, consequently there can be no explicit congressional mandate upon which the Illinois Supreme Court has intruded.

However, a similar provision is contained in the National Labor Relations Act,[6] which provides for an administrative remedy for an employee discharge or discriminated against who has filed charges or otherwise given testimony in a proceeding under that act involving an unfair labor practice.[7] An employee discharged before bringing an action under the N.L.R.A. or participating in proceedings under that act may indeed have been discharged under circumstances that would constitute an unfair labor practice. While it does not fall precisely within the purview of Section 158(a)(4) the employee may nevertheless have a cause of action for retaliatory discharge under the law in Illinois if he were discharged in retaliation for complaining internally contrary to the clearly mandated public policy expressed in that federal enactment.

The Illinois Supreme Court, in its' decision below, rather than creating a conflict with the federal scheme of Section 210, permits a remedy not otherwise contemplated by that provision. Rather than creating a precedent for further intrusion by state courts into federally regulated areas, the decision is consistent with the limited remedies provided by Congress in

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[6] 29 U.S.C. Section 158, *et seq.*

[7] 29 U.S.C. Section 158(a)(4); See *N.L.R.B. v. Schrivener*, 405 U.S. 117 (1972) and *N.L.R.B. v. Retail Store Employees Union, Local 876*, 570 F.2d 586 (6th Cir. 1978).

this and similar enactments. The petitioner can point to no explicit congressional mandate providing that Section 210 is an exclusive remedy, nor that it is contemplated as an exclusive remedy in other federal enactments, nor can it claim that the regulatory scheme is so all pervasive as to render enforcement of congressional purposes impossible or present an obstacle to the accomplishment of congressional purposes. It is simply a broader remedy than that contemplated by Congress and properly within the traditional scope of the states to determine the reach of their tort remedies.

CONCLUSION

For the reasons stated, this Court should deny the Petition for Certiorari and remand the case to the Illinois Supreme Court for appropriate action.

Respectfully submitted,

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